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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1873

KONRAD S. URI, PER NYMARK, ARNOLD RASMUSSEN, RONALD BEIRNES, BORGE H. MANNES, CARL PEROVICH, BJORN NYMARK, SVERRE A. YRI, OLE HENDRICKS, SIGMUND ANDREASSEN, CORY A. KALDESTAD, MICHAEL LYNCH, JR., LARS MYHRE, THOMAS HAUGAN and EMIL VINBERG,
Appellants,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

DOUGLAS M. FRYER
HENRY HAUGEN of
MORIARTY, LONG,
MIKKELBORG & BROZ

WILLIAM B. ROZELL of
FAULKNER, BANFIELD,
DOOGAN & HOLMES

Counsel for Appellants

Office and P.O. Address:
3300 Seattle-First National Bank Bldg.
Seattle, WA 98154

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Counsel for Appellants

Office and P.O.
Address:
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National Bank Bldg.
Seattle, WA 98154

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I.

INTRODUCTION

In its effort to avoid review by this court, Alaska has urged two points. First, that there is a lack of finality in the Alaska Supreme Court resolution of jurisdiction in favor of the State,

and, second, that the passage of HR 200[1] has lessened the importance of the two principal issues presented by this appeal. These are: First, whether there is exclusive federal jurisdiction over living resources of the Continental Shelf. Alaska concedes that this holding is "final" in all respects (Motion to Dismiss, p. 8). The second issue relates to the assertion of jurisdiction by Alaska outside its territory in defiance of the position of the United States. It is this very assertion which is a final action which is so recognized by Oregon and California and which requires review by this court.

Existing law does not support Alaska and, while the passage of HR 200 is relevant, it does not lead to a contrary conclusion, nor affect the rights of appellants who face trial for acts committed before passage of HR 200. While it is understandable that the United States will claim pre-emptive rights on the basis of the new act, as it does under existing law, the new act

1. Now entitled The Fishery Conservation and Management Act, 16 USC § 1801, et seq.

does not diminish the importance of the basic jurisdictional question, particularly since Alaska seeks to construe language in this act on the basis of the opinion below to justify its expanded jurisdiction.

II.

THE JUDGMENT BELOW WAS FINAL IN DENYING APPELLANTS' SUPREMACY CLAUSE DEFENSES AND IN SUSTAINING EXTRATERRITORIAL JURISDICTION

The Alaska Supreme Court has held that control of the living resources of the Shelf, including crab, is not vested exclusively in the federal government and, hence, that appellants' attack upon the Supremacy Clause must fail. Alaska concedes--as it must--that this holding is final. Resolution of this issue alone in favor of appellants would dispose of the entire controversy and hence an appeal is appropriate. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

As to the holding below on extraterritorial jurisdiction, Alaska urges that this lacks finality in that it merely holds that "some

state regulation beyond the so-called three-mile limit is not forbidden per se." (Motion to Dismiss, p. 8). Alaska states that issues of "nexus" and the extent of the burden on commerce or foreign commerce remain. However, the court below did not rely on the "nexus" theory[2] and held as a matter of law:

> (1) We conclude that the commerce clause does not render regulation of fisheries in the Bering Sea the exclusive domain of the federal government.

(Jurisdictional Statement, p. A-23.)

> (2) Having concluded that the doctrines of federal exclusivity and pre-emption are not applicable, and that these regulations are not invalid under Supremacy clause of the Constitution of the United States, we turn now. . .

(Jurisdictional Statement, p. A-40.)

> (3) We therefore conclude that a state may reasonably extend its jurisdiction to control fish and game resources outside the limited area of its territorial sovereignty, if such an exercise is based on the conservation principles inherent in their migratory charateristics and not

2. ". . . [W]e are not persuaded that the state's creation of the concept of a 'crab fishing citizen is particularly helpful--or even appropriate . . .' Appendix A-57, Jurisdictional Statement.

> based on artificial boundaries or political circumstances.

(Jurisdictional Statement, p. A-54.)

> (4) In order that there is no confusion with regard to our holding, we reiterate that the difference in status between each offender does not affect Alaska's jurisdiction over him.

(Jurisdictional Statement, p. A-58.)

As to these crucial issues presented by this appeal, the decision of the Alaska Supreme Court is indeed final and is so recognized by Oregon and California.[3]

3. "Oregon also intends to enforce its regulations against all persons holding Oregon commercial fishing licensed [sic] or fishing out of Oregon ports. Our authority to do this is spelled out in the recent decision of the Alaska Supreme Court in Alaska v. Bundrant, et al., and the many cases cited therein." Jurisdictional Statement, Appendix H-1 & 2.

"The official position of California . . . is that all coastal states have the right to regulate fishing . . . in waters beyond the territorial limits of the coastal states . . . The right of any such coastal states to regulate such fishing is not limited to the citizens or residents of that state, but extends to citizens and residents of other states as well." Jurisdictional Statement, Appendix G-1.

When California requested leave to appear as amicus curiae in the Alaska Supreme Court it urged that the "litigation concerns the right of any coastal state, not just Alaska, to regulate fishing in waters beyond the territorial limits of the state." (Emphasis supplied).

Thus, the decision below presents in sharp focus the critical federal-state conflict as to jurisdiction over living shelf resources and extraterritorial enforcement by a state. It is a fundamental issue that all concerned observers recognize must be resolved by this Court:

> We moreover acknowledge that our decision today may provide the most effective vehicle for assuring that this matter will at last receive the prompt and definitive attention by the final arbiters of such questions--the Congress or the Supreme Court of the United States.

(Jurisdictional Statement, A-39.)

It is the very act of sustaining jurisdiction which is final action. Heretofore direct action by a state outside its territory over a non-citizen has been held to violate the Commerce Clause and the Due Process Clause as a matter of law. Hjelle v. Brooks, 377 F. Supp. 430 (D. Alaska 1974); United States v. California, 332 U.S. 19 (1947); Norfolk & Western Ry. v. Missouri Tax Comm'n., 390 U.S. 317 (1968); Alaska v. Arctic Maid, 366 U.S. 199 (1961). The Alaska Supreme Court was not pursuaded that a resolution of factual issues was material to its

holding[4] and the court was persuaded that adequate facts were established for sustaining the assertion of jurisdiction. It is not disputed that the alleged criminal activity of 14 of the 15 defendants took place at least 16 miles from shore and outside Alaska territory; that only one of the 15 defendants is an Alaska citizen; that the king crab being regulated is "sedentary species" which "are unable to move except in constant contact with the seabed or the subsoil of the Continental Shelf . . ." 16 USC § 1085; Geneva Convention on the Continental Shelf, 15 UST 471, TIAS 5578 (1958); and that the Alaska assertion extends to "an area hundreds of

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4. Alaska urges that, while in the Bundrant case there was a stipulation of fact, in the Uri and Kaldestad cases there was none and that therefore there was no factual determination on which jurisdiction could be based. In the opinion below, the Alaska Supreme Court did not seek to differentiate between Bundrant and Uri. In their motion for reconsideration, appellants sought to draw a distinction between the two cases. In denying the motion, the Alaska Supreme Court held that it had adequate facts on which to base jurisdiction, including facts judicially noticed and that other defenses could be considered by the trial court. (Jurisdictional Statement, C 1-3.)

miles beyond Alaska's territory." Hjelle v. Brooks, 377 F. Supp. at 441; 5 AAC 34.900.

This is a criminal proceeding against appellants, not a declaratory judgment or injunctive proceeding. The result could be penal. The attempt by Alaska to assert jurisdiction and bring appellants to trial is the act which violates the United States Constitution and affords the finality necessary for this court to undertake review. Harris v. Washington, 404 U.S. 55 (1971); Local 438, AFL-CIO v. Curry, 371 U.S. 542 (1963).

Alaska urges that this court should not intervene as it could delay the outcome of the state court criminal trials. Alaska ignores that the Alaska Supreme Court which has primary responsibility for the administration of criminal justice granted a stay of proceedings apparently feeling that whatever jeopardy would occur to the prosecution was outweighed by the importance of this court resolving the issues presented by this appeal. Alaska also ignores that resolution of the issues in appellants' favor will result in final disposition of the controversy.

Defendants are charged and face criminal prosecution for actions undertaken admittedly outside Alaska territory and over which no authority has heretofore authorized such prosecution. Delay would mean that in the interim Alaska, Oregon and California and perhaps other states will pursue law enforcement on the high seas outside their territory.

Alaska contends that both the third and fourth categories of Cox are inapposite to establish the finality of the judgment below. The third category of Cox allows review in those cases where there is no "later review of the federal issue" if the party seeking review loses at trial. Alaska argues that Cox does not apply if there are other federal issues left to be decided and that here there is an "abundance" of such other issues. Actually, there are two other federal issues which have been raised beyond those ruled upon below: (1) Whether the warrantless search by Alaska law enforcement agents of appellants' crab pots was unreasonable under the Fourth Amendment, and (2) whether the Alaska regulations

were impermissibly vague under the Fifth Amendment. The first question, appellants concede, would not be substantial enough to warrant this court's consideration. In any event, the Alaska Supreme Court has now resolved this issue in another case.[5] The second question should not be of sufficient substance at this point to delay review of the more important question of jurisdiction.[6] The issue of vagueness was briefed and argued to the court below but apparently the Alaska Supreme Court felt that the issue was not significant enough even to warrant comment.

Certainly there are cases where this court has refused to review decisions where additional federal questions must later be resolved. See e.g. Hudson Distribs. v. Lilly & Co., 377 U.S. 386, 395 (1964), dissenting opinion of Mr. Justice

5. Nathanson v. State (No. 2541) opinion, August 27, 1976, ___ P.2d ___ (Alaska) holding that there was no reasonable expectation of privacy which would bring a crab pot within the protection of the Fourth Amendment.

6. See Jurisdictional Statement, page 7, footnote 6.

Harlan. It is submitted, however, that the additional issues here do not relate at all to the substantial questions of basic state power, jurisdiction and exclusive federal rights. Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963);[7] Local 438, AFL-CIO v. Curry, 371 U.S. 542 (1963).[8] The issues sought to be raised before this court go to the very heart of the right of Alaska to

7. The question of which court had jurisdiction to try a lawsuit.

"This is a separate and independent matter, antecedent to the merits, and not, emeshed in the factual and legal issues comprising the plaintiff's cause of action." 371 U.S. 558.

8. The question of whether the NLRB had exclusive jurisdiction over a labor dispute as opposed to a state court.

> The case is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction (compare Gibbons v. Ogden, (U.S.) 9 Wheat. 448) nor is it the question of whether federal or state law governs a case properly before the Georgia courts. Compare Teamsters, C.W. & H. v. Lucas Flour Co., 369 U.S. 95. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board.

371 U.S. 548.

bring appellants to trial at all. These questions are "separate and apart" from the question of whether appellants may be convicted. Harris v. Washington, 404 U.S. at 56. Alaska has not distinguished Harris or Local 438 which are controlling.[9]

The presence of other federal issues alone should not delay review, Hudson Distribs. v. Lilly, supra, particularly where those other issues are not jurisdictional and where resolution of the issues posed by this appeal in appellants' favor will not only be dispositive of the entire litigation, but will govern the extra-territorial law enforcement efforts of at least three states.

Alaska states that the third category of Cox likewise does not apply since if appellants succeed on retrial, the State may still appeal the "other federal issues" (Motion to Dismiss,

9. Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), where a state supreme court order reversing a trial court's judgment that a state statute was unconstitutional and remanding for trial was held "final" for § 1257 review.

p. 18). However, the State's right to appeal, as distinct from requesting discretionary writs, is distinctly limited to testing the sufficiency of the indictment or information. Alaska Appellate Rule 5.[10] State v. Browder, 486 P.2d 925 (Alaska 1971). Thus, any acquittal not based upon a construction of the indictment or information would deny the state a right to appeal. Alaska does not even mention California v. Stewart, 384 U.S. 436, 497 (1966), in which this court granted review because an acquittal on the merits would have precluded the state from appealing nor does there appear to be any logic to the State's assertion that if appellants do win on the merits that Alaska must "abandon its

10. "Rule 5. Judgments From Which Appeal May Be Taken. Any appeal may be taken to this court from a final judgment entered by the superior court or a judge thereof in any action or proceeding, civil or criminal, except that the state shall have a right to appeal in criminal cases only to test the sufficiency of the indictment or on the ground that the sentence is too lenient." To the same effect is Alaska Statute 22.05.010. ". . . An appeal to the supreme court is a matter of right, except that the state shall have no right of appeal in criminal cases, except to test the sufficiency of the indictment or information. . ."

fishing laws" (Motion to Dismiss, p. 18). Obviously an acquittal by the jury or dismissal of charges by the court for lack of sufficient evidence will leave the fishing laws totally unaffected.

Alaska also contends that the fourth category of Cox[11] does not apply because the holding below does not seriously erode federal policy. It states that the United States has not made claim to the resource in spite of the position taken by the Department of Justice in the court below that federal jurisdiction was exclusive. In this regard the Attorney General is the spokesman for the United States in the courts and it is his duty to protect claims to government property. United States v. California, 332

11. This category allows review of decisions which (1) would allow the party seeking to prevail on the merits below, (2) where reversal on the federal issue would preclude further litigation rather than merely controlling its nature and character, and (3) where a refusal immediately to review would seriously erode federal policy.

U.S. 19, 27 (1947).[12] The Attorney General speaks for the United States not the Alaska Attorney General.

III.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. The Position of the United States is in Conflict With the Opinion Below

The United States, in its brief as amicus curiae, claimed exclusive jurisdiction over king crab as a living resource of the Continental Shelf and that Alaska could not constitutionally regulate the activities of non-citizens of Alaska on the high seas. The opinion below rejected both contentions. In its motion to dismiss, Alaska seeks to avoid this conflict by stating

12. During the tide land legislation debates this was recognized by Senator Cordon. "Every state . . . must forever face the fact that some of these days . . . the Department of Justice will conclude that it desires to assume some additional jurisdiction and proceed to do so." Hearings Before Committee on Int. and Ins. Affairs, Senate, 82nd Congress, First Session, on S.J. Res. 20, Submerged Lands (1951) (p. 406).

that the only real concern of the United States is with respect to possible enforcement of Alaska regulations over foreign nationals, and that this case, according to the Alaska Supreme Court, does not present such an issue. This does not accurately reflect the position of the United States.

A critical threshhold question is whether the taking of living resources of the Shelf is "fishing" at all. See dissenting opinion of Mr. Justice Connor, Jurisdictional Statement, A-71, 78.

> Whether crabs are included in fishing rights, or are a resource of the ocean floor, for purposes of the act [OCSLA] is precisely the question at issue here.

The whole area of regulation of ocean floor resources is inextricably entwined with international law and affairs and with claims of the United States. United States v. California, 332 U.S. 19 (1947). the OCSLA preserves the rights of freedom of "fishing" on the high seas while claiming exclusive federal jurisdiction for taking of Shelf resources. 42 USC § 1332.

Senator Cordon's language indicated that the freedom of fishing is restricted to "all marine life above the land itself beneath the seas"--fish in the water column. Senate Rep. No. 411, 83rd Congress, 1st Session (1953).

> But crabs, in both international law, as related above, and municipal United States law, Bartlett Act, 16 USC Section 1085 (1964), are creatures of the sea floor, and not fish belonging to the water column "above the land itself".

Connor, Jurisdictional Statement, A-71.

Even if the taking of crab is "fishing" as distinct from harvesting shelf resources, unilateral action by any state of the union in international waters in a crab fishery utilized at present by three nations will have international complications. See dissenting opinion of Mr. Justice Connor, Jurisdictional Statement, A-78.

> Thus, if states may regulate "fishing" on the high seas generally, their regulations, once notified to the proper authorities, create international obligations.

Moreover, prior attempts by Alaska to assert its fisheries laws on the high seas are documented. For example, in United States v. Alaska,

422 U.S. 184 (1975), an incident is discussed wherein Alaska arrested three Japanese fishing vessel captains more than three miles from shore in Shelikof Strait and charged them with violation of Alaska regulations.

Alaska has failed totally to respond to the claim by the United States of exclusive jurisdiction over king crab as a living resource of the Continental Shelf. It is not even mentioned in the motion to dismiss. The federal government has, of course, acted as trustee for the citizens of all states in claiming this resource. In addition, the United States in the court below has sought to restrain an extension of Skiriotes v. Florida, 313 U.S. 69 (1941), whereas the opinion below has expanded Skiriotes to allow Alaska to regulate the citizens of other states such as appellants.[13]

13. The action of the Alaska Legislature in unanimously condemning appellants' actions is politically invulnerable, since appellants have no vote in Alaska. This is one of the aspects of the relationship between citizen and state which would seem to allow extraterritorial regulation.

Alaska has also failed to discuss that Oregon and California, in reliance upon the opinion below, and in defiance of the position of the United States, have asserted extraterritorial jurisdiction over non-citizens (Jurisdictional Statement, G-1, H-1).

B. The Passage of HR 200 Does Not Lessen the Importance of the Questions Posed

Alaska incorrectly contends that the Fishery Conservation and Management Act, 16 USC § 1801, et seq., lessens the importance of the questions posed.[14] The new statute does not resolve the questions presented in this case such as including the ownership and exclusive jurisdiction of king crab as creatures of the Shelf, and control by one state outside its territory over citizens of other states.

The new statute which is effective on March 1, 1977 establishes a "conservation zone" extending from the boundary of the state (3 miles for

14. Because defendants face jail sentences and fines if convicted there is no possibility of these cases becoming moot.

Alaska)[15] to a distance of 200 miles. 16 USC § 1811. The act then sets forth three distinct concepts which are germane here: (1) control of shelf resources, (2) federal management of fishing within the zone, and (3) state regulation within the zone.

In the new act exclusive federal regulation over living Shelf resources such as crab is provided for only in the area beyond the conservation zone, i.e., 200 miles. 16 USC § 1812(3).[16] There is no resolution whether the federal government has exclusive jurisdiction of Shelf resources within the zone as is posed by this case. Appellants urge that that is provided by the OSCLA.[17]

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15. 72 Stat. 339; 43 USC § 1312.

16. "The United States shall exercise exclusive fishery management authority in the manner provided in this chapter, over the following: (3). All Continental Shelf fishery resources beyond the fishery conservation zone."

17. Nor can Alaska argue that the failure of Congress to assume exclusive federal jurisdiction over shelf resources within the zone in 1976 indicates that Congress did not intend to do so in earlier years. United States v. Price, 361 U.S. 304; Pampanga Sugar Mills v. Wenceslao Trinidad, 279 U.S. 211.

With respect to the area within the zone the new act is ambiguous as to jurisdiction. It provides for federal management authority as "provided for in this chapter" over fish within the zone, 16 USC § 1812(1), but goes on to imply that states may continue to regulate in the same manner as is consistent with existing law. 16 USC § 1856(a). That proviso begins by stating that nothing in the act shall extend or diminish State authority within state boundaries. 16 USC § 1856(a).[18] It then provides that state regulation of fishing outside a state's boundaries is not permitted unless the vessel in question is registered under the laws of the state. "Registration" thus will permit state regulation

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18. This is similar to the Bartlett Act of 1966, 16 USC § 1094, which also states that "Nothing in this chapter shall be construed as extending the jurisdiction of the states to the natural resources beneath and in the seas within the fishery zone." (An area 9 miles outside state territory.) The opinion below brushed aside this statute as applying only to foreign fishing. Jurisdictional Statement, A-34. Compare Douglas v. Sea Coast Products, No. 75-1255, which held that the Bartlett Act pre-empted all state regulation of fisheries as to who is entitled to approve the entry of foreign fishing vessels within the marginal sea.

within the zone but is nowhere defined. It may well be a confirmation of Skiriotes v. Florida, 313 U.S. 69 (1941), that a state may regulate its own citizens beyond its boundaries since vessels are documented with the Coast Guard in the state or residence of the owners. 46 USC § 17. Alaska here urges, however, on the basis of the opinion below, that the state can require "registration" as a condition of landing fish and thus exercise extraterritorial jurisdiction (Motion to Dismiss, p. 21). Obviously, the new act does not provide an answer to the question of basic state authority over non-citizens. That issue is now presented to this court. The counsel to the Senate Commerce Commitee, a principal draftsman of the new act, has stressed the continued importance and necessity for review of the opinion below.[19]

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19. Letterhead Stationary of
United States Senate
Committee on Commerce
Washington, D. C. 20510

July 9, 1976

Alaska's citation of 16 USC § 1856(b) is also misplaced (Motion to Dismiss, p. 30). That section allows the Secretary of Commerce to assert exclusive fisheries jurisdiction "within the boundaries of such State" after notice and hearing. It has nothing to do with asserting jurisdiction outside a state's territory let alone with the question of federal ownership and control of living Shelf resources.

Mr. Douglas M. Fryer
Moriarty, Long, Mikkelborg & Broz
3300 Seattle-First National Bank Bldg.
Seattle, Washington 98154

Dear Mr. Fryer:

Thank you very much for a copy of your jurisdictional statement in the Uri case. I certainly hope the Court grants review, as I firmly believe this is a very important national issue which should be resolved at this time. I would certainly appreciate any further information you have about the case, particularly any other briefs that may easily be made available to me.

Best personal regards.

Sincerely yours,

s/ Bud Walsh
James P. Walsh
Staff Counsel
JPW:bwa

C. The Conflicts Between the Opinion Below and Federal Decisional Law Remain

1. The Hjelle case

Alaska makes a number of statements about Hjelle v. Brooks, supra, which are inaccurate and misleading and which require clarification.[20] Hjelle is a civil case involving issues to some extent broader than as posed here.

(a) Exclusive federal jurisdiction

Alaska states that the Hjelle court discounted the Supremacy Clause argument. However, the reason that the original Hjelle opinion

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20. Alaska commences the series of misleading statements by stating

"These regulations were originally challenged by a group composed of the same class, if not the same persons, as appellants . . . in the United States District Court for the District of Alaska. The action was dismissed in June 1970." (Motion to Dismiss, p. 3).

The regulations here challenged were not even promulgated until June 1974. (Motion to Dismiss, p. 4). The 1970 case never proceeded to any disposition let alone a reported one. It did involve Alaska's attempt to reduce the federally established minimum crab size and it was dismissed by agreement when Alaska agreed to conform to federal standards. It is not relevant to these proceedings except to show that the litigation over Alaska's extraterritorial assertion has existed for more than six years. North Pacific Fishing Vessel Owners Association v. Norenberg, U S. District Court, Alaska, No. J-9-70.

determined that at that "incipient stage" (motion for preliminary injunction) it did not appear that plaintiffs were reasonably certain to succeed on the supremacy argument was because:

> The complexity of the issues involved, magnified by the necessity to probe deeply into legislative history to determine the intent of congress in enacting the Outer Continental Shelf Lands Act, does not lend itself to resolution at this stage of the litigation."

377 F. Supp. 438.

This can hardly support Alaska's contention.

(b) Extraterritorial jurisdiction

Alaska contends that the Hjelle court "following an August 1975 trial," refused to enjoin enforcement of the new regulations because of their "apparent validity" (Motion to Dismiss, pp. 4, 5, 24). This is a serious misstatement. The Hjelle court in June 1976 abstained from any decision on grounds of Younger v. Harris, 401 U.S. 37 (1971). The court did indicate that in June 1974 it had declined a preliminary injunction against the new emergency regulations because of "their possible validity." (Motion to Dismiss, Appendix A, ii). Then in 1976, the court abstained

and declined to consider the evidence presented in any manner.

The Hjelle court did decide in its earlier opinion that a direct assertion of extraterritorial power by Alaska violated the Due Process Clause of the 14th Amendment and the Commerce Clause as a matter of law. 377 F. Supp. 430. The Alaska Supreme Court expressly refused to follow this holding.[21]

(c) Landing laws

Nor did the Hjelle opinion suggest, as Alaska asserts, that direct regulation could be accomplished outside Alaska through a landing law, "If carefully writen to serve local goals." (Motion to Dismiss, p. 4, 377 F. Supp. 441). What the Hjelle opinion was talking about there was the possibility that enforcement inside Alaska might be accomplished through a carefully worded landing law even though such enforcement

21. "We do not find the state's interest in regulation is as limited as the position asserted by appellees and adopted by the three judge federal court in Hjelle." Jurisdictional Statement, A 49-54.)

might indirectly affect crab taken outside of the state.[22] Similarly, Alaska's argument that the landing law cases support its direct enforcement on the high seas is without merit. Every landing law case involves enforcement within the confines of the state and, hence indirect offshore enforcement. Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936); Silz v. Hesterberg, 211 U.S. 31 (1908); Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967); Frach v. Schoettler, 46 Wn.2d 281, 280 P.2d 1038. While some of the issues in Hjelle did involve the legitimacy of the landing laws, these cases do not. Defendant Kaldestad's case is the only one involving a land law and his defense is based solely on the Supremacy Clause.

2. United States v. Ray

The State is also unsuccessful in attempting to explain United States v. Ray, 423 F.2d 16

22. ". . . [I]f [Alaska's] regulations were directed at conserving crab within Alaska waters by regulating crabbing in that area and, in order to facilitate enforcement, by prohibiting the possession of crab in the state during the closed season, even if that crab were caught outside the State." 377 F. Supp. 441.

(5th Cir. 1970), as not being in conflict with the opinion below. The Ray case expressly held that any doubt as to whether living resources of the Shelf were included within the meaning of the Outer Continental Shelf Lands Act was dispelled by the Geneva Convention of 1958.

> To the extent that any of the terms of the Act (OCSLA) are inconsistent with the later adopted Geneva Convention on the Continental Shelf, they should be considered superseded. See Cook v. United States, 288 U.S. 102, 118-119. (423 F.2d at 21).

Thus, the holding of the Ray case is that living resources of the Shelf are included within the meaning of natural resources under the OCSLA whereas the opinion below holds they are not. Alaska's characterization of the Ray case as a trespass case is not accurate.

> Although the complaint is inaccurately framed in terms of trespass in count one, the Government repeatedly stresses it is not claiming ownership of the reefs.

423 F.2d at 22. The injunction was there granted because "under national and international law" (423 F.2d 22), the resources were subject not only to United States jurisdiction but its control

as well.[23] The legislative history of the OCSLA will demonstrate that exclusive, sole jurisdiction of all Shelf resources was intended and that the attempts by states rights advocates for concurrent state jurisdiction were decisively defeated on two occasions. 1953 Cong. Rec. 7232, 7236. As aptly stated in United States v. Texas, 339 U.S. 707, 719 (1950), prior to the passage of the OCSLA or Submerged Lands Act:

> If the property, whatever that may be, lies seaward of low water mark, its use, disposition, management and control involve national interests and national responsibilities.

(Emphasis supplied).

The holding of the Ray case, that living resources, such as sedentary speci are included within such definition either because of the legislative history of the OCSLA, the SLA or the

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23. One other case proffered by Alaska in support of its position is the unreported decision of United States v. Thompson (Motion to Dismiss, p. 32), which involved a federal prosecution under state regulations of United States citizens for poaching of polar bears outside Alaska territory.

Geneva Convention is in direct conflict with the Alaska Supreme Court.

IV.

CONCLUSION

The Alaska Supreme Court has shown great care in its opinion to establish the finality of its judgment on the substantial federal issues presented by this appeal. The opinion is so regarded by two other states, Oregon and California. Alaska is irresponsible in arguing now that, after the uncertainty of 6 years of litigation, appellants must return to the trial court for a determination of whether the regulations are vague. Alaska ignores the invitation for review by the Alaska Supreme Court itself in both the opinion below and stay pending this appeal.

Alaska argues that HR 200 has lessened the importance of the questions presented by this appeal and at the same time uses the opinion below as a basis for extended jurisdiction under the new act as well as under existing law. A

decision by this court as to the basic state power is essential to an understanding of this act.

In view of the uncertainty facing all parties about the extraterritorial jurisdiction of coastal states, the conflicts posed, and the effect on the international fisheries, this court should hear this appeal.

There is no legal authority to sustain the extraterritorial action of Alaska and Alaska's reference to these cases as "stop gap" pending passage of HR 200 (Motion to Dismiss, p. 20) does not validate the assertion. In the event this court chooses not to delineate the jurisdiction of coastal states prior to HR 200, the cases should be summarily reversed.

Respectfully submitted,

DOUGLAS M. FRYER
HENRY HAUGEN of
MORIARTY, LONG,
MIKKELBORG & BROZ

WILLIAM B. ROZELL of
FAULKNER, BANFIELD,
DOOGAN & HOLMES

Counsel for Appellants

CERTIFICATE OF SERVICE

I, DOUGLAS M. FRYER, a member of the Bar of the Supreme Court of the United States and one counsel for Appellants in the above-captioned matter, hereby certify that three (3) copies of this Brief of Appellants in Opposition to Motion to Dismiss have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with postage prepaid (airmail designation no longer required by post office), this 17th day of September, 1976, as follows:

GERALD W. MARKHAM, ESQ.
Assistant Attorney General
Office of the Attorney General
Anchorage Civil Section for the
State of Alaska
360 "K" Street, Suite 105
Anchorage, Alaska 99501

Solicitor General
Department of Justice
Washington, D.C.

Office of the Attorney General
State of California
6000 State Building
San Francisco, California 94102

Attention: EVELLE J. YOUNGER, CARL BORONKAY
and RODERICK WALSTON

All persons required to be served have been served.

DOUGLAS M. FRYER